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IN THE SUPREME COURT OF THE UNITED STATES

GARY GILBERT CARLSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Supreme Court, U. S.
FILED
DEC 26 1973
MICHAEL RODAK, JR., CLERK

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No._____

GARY GILBERT CARLSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

This is a Petition for Writ of Certiorari to the Supreme Court of the State of California from its Order of October 18, 1973 denying a Petition for Hearing from an adverse decision

of the Court of Appeals for the State of California, Second Appellate District, which affirmed in part and reversed in part, a Judgment of the Superior Court of the State of California, for the County of Los Angeles.

Reasons for granting a Writ of Certiorari:

1. The defendant was convicted of two counts of the California Penal Code involving violations of the obscenity laws of the State of California. No question is raised here involving the question of obscenity, but rather the thrust is on the question of an illegal search and seizure whereby information was gathered through allegedly illegal means to support an Affidavit for search warrant which was subsequently issued and served, and the question presented revolves around the reasonable expectation of privacy.

JURISDICTION

The jurisdiction of this Court is invoked under .Title 28, United States Code Section 2101.

FACTS

On December 1, 1971, officers of the Los Angeles Police Department received an anonymous letter from an alleged "outraged

parent," complaining that their son, without regard to age, had received what they considered to be an obscene advertising material in the mail. The advertiser had an address and the name "The John Harrison Company" in Van Nuys, California. Based upon this material, the officers obtained a search warrant for the Van Nuys office of "The John Harrison Company." A search of "The John Harrison Company" in Van Nuys turned up nothing of an incriminatory nature, but led the officers to do a further investigation whereby they located the defendant Carlson at his home address at 2002 Perry Street, Redondo Beach, California. However, at the location of "The John Harrison Company," the officers observed envelopes with the return address of "The John Harrison Company." Subsequent thereto, and on December 10, 1971, the officers went to the Perry Street address and observed two motor vehicles. The officers made a Department of Motor Vehicles check and determined that they were registered to Mr. Carlson. The officers then proceeded to engage in nighttime stakeouts (C.T. p. 40), and on one of the nighttime stakeouts, observed Mrs. Carlson drive up to the location in an automobile, observed Mr. and Mrs. Carlson leave the residence at 2002 Perry Street, Redondo Beach, open the trunk and remove a large box. The officer testified that from where he was standing, the box appeared to contain large envelopes that appeared to be the same envelopes he observed at "The John Harrison Company" in Van Nuys (C.T. pg. 40 lines 15-18). The officers further

testified that they looked over to the backyard fence of the defendant and observed the defendant and observed the defendant seated behind a desk with a stack of small red boxes, a large quantity of envelopes, and some brown manila envelopes and observed the defendant opening letters (C.T. p. 41, lines 17-27; p. 42, lines 8-13). This observation was apparently made on December 15, 1971. The officer testified that the incident involving carrying the box from the car occurred on December 15, 1971 and the observation through the window involving the packaging of red boxes occurred on December 16, 1971, both observations made by a clandestine nighttime spying operation using binoculars (C.T. p. 42, line 28; pg. 43, line 1; p. 43, lines 13-18). The officers further testified that they looked through the backyard of the defendant and observed the defendant holding brochures with pictures on them (C.T. p. 44, lines 22-23). The officer further testified that he could determine that some of the pictures had "sex activity" (C.T. p. 44, lines 25-26). The officer further testified that the brochures appeared to be "similar" to the ones he received from the "irate parent" (C.T. p. 44, lines 26-28; p. 45, lines 1-2). The officer admitted that he could not read any of the printing on the envelopes that he had seen carried into the house in the box (C.T. p. 74, lines 8-10). The officer further testified that he could not discern any type of activities from his viewpoint on the first occasion (C.T. p. 74, lines 18-19). The officer further testified that he

could not see the exact details of the sex activities but only what appeared to be sexual intercourse and oral copulation and that he had only been a vice officer for about four months (C.T. p. 77, lines 2-14). Based on the observations aforesaid, the officers secured a search warrant and seized all of the incriminatory evidence upon which the convictions herein are based. The defendant attacked the search warrants during the Preliminary Hearing and a 1538.5 Motion made at the time of the trial was submitted on the contents of the Preliminary Hearing and denied (C.T. p. 135, lines 29-47). The original charge filed upon which the defendant was held to answer was one of conspiracy to violate Sections 311.2 and 311.5 of the Penal Code. Prior to the commencement of the trial, which was also submitted on the contents of the Preliminary Hearing and over the strenuous objections of the defendant (R.T. on Appeal, p. 3, lines 12-17), and the Court overruled the defendant's objection and allowed the filing of an amendment to the Information (R.T. on Appeal, p. 4, lines 24-25) which allowed six counts, charging misdemeanors in violation of Sections 311.2 and 311.4; of the six additional counts added, two dates were involved; December 23, 1971 and February 2, 1972. The Court found the defendant and appellant Not Guilty of the felony conspiracy count, but guilty of the amended Information charging in Count 2, a violation of Section 311.5 and in Count 7, a violation of Section

311.2. The Court sentenced the defendant to 180 days on each count to run consecutively.

ARGUMENT I

The materials in question which were a large quantity of reels of film, approximately 628 reels of film, and a quantity of advertising materials in relation to said films, were seized pursuant to the search warrant of the Redondo Beach Police Department. The search warrant was based on an anonymous complaint by an informant which led the officers to a Van Nuys address, where the officers observed certain envelopes with the return address of "The John Harrison Company." Subsequent thereto, the officers had a discussion with a postal inspector around the 10th of December 1971, who advised that the defendant and appellant owned and controlled "The John Harrison Company" and provided a Redondo Beach address to the officer (C.T. p. 38, lines 15-28; p. 39, lines 1-4). The officer then proceeded to the Redondo Beach address pursuant to same, and on two separate nights, made the observations referred to and at his home address saw material that looked similar only, and materials that he could not discern the exact details. In order for a Magistrate or a Judge to issue a search warrant in reference to materials covered by the First Amendment of the U. S. Constitution, the Magistrate or Judge must be convinced that the

three pronged tests of the Roth case have been met. (Roth v. United States, 354 U.S. 476). However, in the instance here, the officers showed certain materials received from the anonymous informant to the Magistrate, but it was not these materials that supported the warrants, but the officer's statements that he observed similar materials. The officer was not qualified as an expert nor did he say the materials he observed through the window of the Redondo Beach property appealed primarily to the prurient interest of the average adult, that the materials transcended community standards in depicting sex and nudity and that the materials taken as a whole were utterly without redeeming social value. Instead, he merely stated that the materials appeared to be similar and that he could not see the exact details nor could he read any of the printed materials and yet based upon those statements, the Magistrate or Judge who issued the search warrant determined that the officer's observations were obscene material, despite the fact that the Court did not personally observe any of the materials that the officer observed in the Redondo Beach premises.

ARGUMENT II

The officers observed the materials in question by a clandestine peeking over a fence with binoculars at night through an apperture

in petitioner's curtains into his home. In the case at bar, the officers did not physically trespass on the defendant's property, but instead peered over a neighbor's fence with a pair of binoculars at night through an opening in petitioner's curtains into his house. The principle enunciated by this Court in the case of Katz v. U.S., 389 U.S. 347 was the defendant's reasonable expectation of privacy. In the Katz case, there was no trespass but instead the electronic bugging of a public telephone booth from which Katz was making a phone call. If Katz had a reasonable expectation of privacy in a public telephone booth on a public street, then certainly the petitioner herein had reasonable expectation of privacy in this own den at night, the windows of which did not face out onto any public street, but which required the officers to go into a neighbor's backyard and clandestinely peer by aid of binoculars through the night into petitioner's home. There is no question whatsoever but that the petitioner herin was subjected to an unreasonable search and that illegally obtained evidence was used as a basis for a search warrant Affidavit and the California Court of Appeals below blithely ignored the principles enunciated in the Katz case in affirming petitioner's conviction.

CONCLUSION

The convictions herein should be reversed for the reasons that the search warrant was not based upon the Magistrate viewing of the materials personally, but merely upon the officer relating to the Magistrate that the materials that the officer observed were similar to the ones shown to the Magistrate. The convictions should further be reversed on the basis that allowing an amendment to charge misdemeanors on the day of trial is an unfair disadvantage to the defendant, when the defendants are prepared to defend only one felony conspiracy and at the last minute are required to defend all six new misdemeanor charges not involving conspiratorial conduct.

Respectfully submitted,

BRUCE P. WOLFE,

Attorney for Petitioner

Not to be published in the Official Reports

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

vs.

GARY GILBERT CARLSON,

Defendant and Appellant.

2 Crim. No. 22937

(Superior Ct. No. A 179640)

AUG 21 1973

APPEAL from a judgment of the Superior Court of Los Angeles County in a prosecution for violation of sections 311.2 and 311.5 of the Penal Code. Bernard Lawler, Judge. Judgment reversed with respect to imposition of sentence as to one count and otherwise affirmed.

Bruce P. Wolfe for Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General--Criminal Division, William E. James, Assistant Attorney General--Appeals Section, and Norman H. Sokolow and Bradley A. Stoutt, Deputy Attorneys General, for Respondent.

In a nonjury trial the defendant Gary Gilbert Carlson was found guilty of violation of section 311.5 of the Penal Code, a misdemeanor (count II), and of violation of section 311.2 of the Penal Code, a misdemeanor (count VII).[1] Probation was denied. With respect to each offense the defendant Gary Gilbert Carlson was ordered to be punished by imprisonment in the county jail for a term of one hundred eighty days, the sentences to run consecutively. He has appealed from the judgment.

No contention is made that the films involved were not in fact obscene. But it is contended that there was not probable cause for the issuance of the search warrant pursuant to which the defendant's home was searched, that it was error to allow an amendment of the information on the day of trial, and that the defendant was subjected to multiple punishment in violation of the provisions of section 654 of the Penal Code.

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1 Each of the offenses was alleged to have occurred on or about December 17, 1971.

In count II it was alleged that the defendant Gary Gilbert Carlson and other named defendants "did willfully and unlawfully promote the sale and distribution of matter represented and held out by them to [be] obscene."

In count VII it was alleged that the defendant Gary Gilbert Carlson and other named defendants "did willfully, unlawfully and knowingly send and cause to be sent, and bring and cause to be brought, into the State of California for sale and distribution, and in the State of California, prepare, publish, print, exhibit, distribute and offer to distribute, and have in their possession with intent to distribute and to exhibit and offer to distribute, obscene matter, to wit, obscene films."

Turning to the contention as to the search warrant, pursuant to stipulation the motion to suppress evidence was submitted upon the transcript of the preliminary hearing.[2] Pertinent portions thereof will be hereinafter noted.

Three search warrants were involved in this case, but only the third is of real import on this appeal.[3] The first search warrant (No. 7134) related to suite 135 on the first floor of a building located at 13609 Victory Boulevard in Van Nuys. The affidavit in support thereof was that of Officer Weller of the Los Angeles Police Department which was subscribed and sworn to before a judge of the municipal court on December 2, 1971. The officer stated that he had been assigned to the vice detail for the past four months. He further averred that on December 1, 1971, he received an anonymous letter in which it was stated: "From-irrate [sic] parents. This filth was sent to us in the mail. It was sent to our minor son - This envelope was included so he could order more if he wanted it. Isn't there a law against this trash - How old are the models - They must be some kind of adicts [addicts] or animals. If we

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2 After the motion to suppress evidence was denied, at the trial, pursuant to stipulation, the issue of guilt was submitted upon the transcript of the preliminary hearing.

3 In addition, there was a fourth search warrant with respect to premises on Lankershim Boulevard in North Hollywood, but it does not appear to be necessary to consider it on this appeal.

receive anymore trash you will receive it too." The "citizen's letter" enclosed an order form, a number of pictures "depicting" oral copulation and sexual intercourse, and a return envelope addressed as follows: "John Harrison 13609 Victory Blvd. Van Nuys, Calif. 91401."

The affiant further stated that he conducted an independent investigation on December 2, 1971, at 13609 Victory Boulevard. The directory inside the building showed that John Harrison Company was located in suite 135. The officer knocked on the door of the "suite" but received no response. He then proceeded to the city clerk's office in Van Nuys and observed a permit issued on November 17, 1971, for a business using the name of John Harrison Company at the address, the owner being shown as Thomas Truax.

In the affidavit the officer set forth the contents of the order form; therein it was stated: "Special Hard Core Films Now Available." The form contained numbers and names or descriptions of films, the names or descriptions plainly indicating that the films related to sexual activities.

The officer also described the "[d]epiction of pictures on order form." The ensuing portion of the affidavit set forth the officer's opinion that a "dominant theme of these pictures, taken as a whole, obviously is designed to appeal [to] purient [sic] interest in sex of the viewers and is patently offensive," together with the factual basis for that opinion. The officer also expressed the opinion that the pictures failed "to impart any beneficial ideas

of scientific or social importance" and the factual basis on which he relied for that opinion.

A copy of the order form and related pictures was attached to the affidavit.

Nothing was seized pursuant to the search warrant relating to the Van Nuys location.

The second search warrant (No. 7141) will be only briefly mentioned since no contention on this appeal requires a determination of its validity. The affiant was Officer Weller and the affidavit was subscribed and sworn to on December 10, 1971. It related to the seizure of a parcel in the custody of the post office at Van Nuys. The parcel was addressed to "John Harrison 13609 Victory Blvd. Van Nuys, California 91401." It was averred that the parcel contained one or more 8 mm. film in black and white or color. The affidavit contained the substance of the statements in the prior affidavit submitted in support of the first search warrant. At the time set for the preliminary hearing the motion to quash the search warrant under discussion was granted.

The third search warrant (No. 7150), being that which is primarily involved herein, related to a dwelling house located at 2002 Perry Street, Redondo Beach, two described automobiles, and the person of the defendant Gary Gilbert Carlson. The personal property described therein consisted of "order forms with pictures depicting sexual intercourse and oral copulation," described in the "affidavit attached," and reels of motion picture film, described in the order

form attached to the affidavit, and "any paraphernalia" of a specified nature.

The affidavit in support of the search warrant was that of Officer Jamieson of the Los Angeles Police Department. It was subscribed and sworn to before a judge of the superior court on December 17, 1971. The officer stated that he had been assigned to the vice detail for the past month. On December 9, 1971, after contacting a named post office superintendent earlier that morning "to be on the look out for return mail addressed to John Harrison," the officer received information from the post office superintendent that a parcel addressed to John Harrison, 13609 Victory Boulevard, Van Nuys, had been returned to the post office, "postage due." The officer had observed a mailman attempt to deliver the parcel at suite 135, 13609 Victory Boulevard, on December 9, 1971, and leave a notice for the addressee to come to the Van Nuys post office to pick up "postage due mail."

Officer Jamieson then set forth in the affidavit information as to the "irate parents" letter, his ensuing investigation made on December 2, 1971, at the building located at 13609 Victory Boulevard and his inquiry made at the city clerk's office, the information being in substance the same as that embodied in portions of the affidavit of Officer Weller in support of the first search warrant. Attached to the affidavit was a copy of the order form and pictures.

In the affidavit of Officer Jamieson it was further stated that he believed that the parcel at the post office contained one or more of the "catalog listed 8mm films which are described in the above order form" and that the film was mailed from "John Harrison (Corp.) via the U.S. Mail Service for the purpose of distributing in violation of 311.2 of the Penal Code of the State of California." Upon receiving the information from the superintendent of the Van Nuys post office the officer contacted "the U.S. Attorney General's Office" and was given permission to serve a search warrant on the grounds of the Van Nuys post office for the purpose of seizing the parcel. The officer also contacted the chief investigator in the postal inspector's department and was given permission for the investigation. The reel of 8 mm. film was seized "from the U.S. Post Office by search warrant #7141, signed" by a judge of the superior court. The immediately ensuing portion of the officer's affidavit was as follows: "The above reel of 8mm film was identified as the film listed on the attached order form, #41 and this film contained acts of sexual intercourse, oral copulation, masturbation and the dominant theme of this film and brochure depicting above described acts, taken as a whole, obviously is designed to appeal to the purient [sic] in sex of the viewers and is patently offensive in that the focus of the camera returns to the vaginal area of the female and scrotum area of the male and its acts of masturbation, oral copulation, and sexual intercourse." The officer expressed the further opinion that the "film and order form with the described pictures

. . . fails to impart any beneficial ideas of scientific or social importance."

"With the above information" the officer conducted a further investigation. The officer received information from a postal inspector, who was also conducting an investigation as to a person known to the officer as "Thomas Traux [Truax] DBA John Harrison Company, located [at] 13609 Victory Boulevard, Suite 135, Van Nuys." The officer was informed that the true name of that person was Gary Gilbert Carlson, who lived at 2002 Perry Street, Redondo Beach.

The officer proceeded to the Redondo Beach location. He described what he there observed as follows:

"On 12-15-71, 2100 hours, your affiant was staked out near the above address and observed a 1971 Lincoln Continental, white over white, 2door, California license 720 CZU drive up into the driveway at 2002 Perry Street. A female Caucasian got out and walked to the rear of the vehicle. At that time, a person known to your affiant as Gary Gilbert Carlson exited the residence at 2002 Perry Street and removed a cardboard box which contained a large quantity of envelopes. Your affiant recognized those envelopes as similar to the envelopes that your affiant saw when he served a search warrant on the 'John Harrison Company, located at 13609 Victory Boulevard Suite 135, Van Nuys, California'. Mr. Gary Gilbert Carlson carried the cardboard box and envelopes into the residence located at 2002 Perry Street. Your affiant also

observed a 1969 Imperial 4door, black over black, Nevada license CX , parked in said driveway at 2002 Perry Street. Your affiant checked DMV Nevada and noted that the 1969 Imperial Nevada license CX was registered to Gary Gilbert Carlson.

"On 12-16-71, 1900 hours, your affiant returned to 2002 Perry Street for a further investigation and observed from the street the rear part of Gary Gilbert Carlson's residence, 2002 Perry Street. Your affiant observed thru a sliding glass door a person known to affiant as Gary Gilbert Carlson. This room was well lighted and your affiant could clearly see that person seated at a desk. The room is described as approximately 40'x20', panelled on the east wall, dark brown wood panelling. The room also contained a desk and chair and two filing cabinets. Your affiant also observed lying on top of the desk, in front of Gary Gilbert Carlson, a large stack of envelopes and miscellaneous papers. At that time, your affiant proceeded to 2902 Green Street, which is located to the south of Gary Gilbert Carlson's residence and offers an unobstructed clear view of above described room. Your affiant received consent and permission from Mr. and Mrs. Adams, who is the owner of that residence and property, located at 2902 Green Street, to enter their back yard for the purpose of observing Gary Gilbert Carlson and above described room. Your affiant further observed Gary Gilbert Carlson opening the envelopes, which were stacked on his desk. Your affiant observed Gary Gilbert Carlson remove what appeared to be above attached order form and pictures. Your affiant

observed Gary Gilbert Carlson write on these order forms and on other envelopes. Your affiant observed Gary Gilbert Carlson pick up a stack of papers, which looked like the order forms and pictures that are attached. Gary Gilbert Carlson walked out of the room out of your affiant's sight. He then returned empty-handed and again started opening envelopes and removing what appeared to be order forms. In your affiant's opinion Gary Gilbert Carlson was preparing to distribute the films from the order forms he had received and or distributing the order forms for the purpose of obtaining or soliciting orders."

Before turning to the transcript of the proceedings on the occasion of the preliminary hearing, upon which the motion to suppress the evidence of the reels of film and advertising material relating to those films seized pursuant to the search warrant was submitted, the argument presented on this appeal in behalf of the defendant Gary Gilbert Carlson should be noted so as to bring into focus the question presented. The core of the defendant's position is found in the following portion of his brief: ". . . the officers showed certain materials received from the anonimous [anonymous] informant [the "irate parents"] to the Magistrate, but it was not these materials that supported the warrants, but the officer's statements that he observed similar materials. The officer was not qualified as an expert nor did he say the materials were exactly the same, nor did the officers testify that the materials he observed through the window of the Redondo Beach property appealed primarily to

the prurient interest of the average adult, that the materials transcended community standards in depicting sex and nudity and that the materials taken as a whole were utterly without redeeming social value. Instead, he merely stated that the materials appeared to be similar and that he could not see the exact details nor could he read any of the printed materials and yet based upon those statements, the Magistrate or Judge who issued the search warrant determined that the officer's observations were obscene material, despite the fact that the Court did not personally observe any of the materials that the officer observed in the Redondo Beach premises."

Turning to the proceedings on the date of the preliminary hearing, pertinent portions of Officer Weller's testimony will be noted. As to the information he received from Postal Inspector Lotts about December 10, 1971, Officer Weller testified: "A. I asked for any information concerning the John Harrison Company, and he informed me that he also was investigating that company for federal violation. Q. Did he tell you about any other persons? This is for probable cause. A. Yes. He stated that the person who he was investigating, he believed, was a Mr. Carlson who also went by the name of Thomas Traux [Truax][4]. He stated that Mr. Carlson owned and controlled Jack Franklin Company of Carlson Production International,

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4 This information was erroneous. The record clearly shows that Carlson and Truax, while associated in some way, were different persons.

John Harrison Company, and said that through his investigations that Mr. Carlson represented himself as Mr. Thomas Traux and that the address where Mr. Carlson lived at was 2002 Perry Street in Redondo Beach."

Officer Weller further testified that as a result of receiving the information from the postal inspector he proceeded to 2002 Perry Street in Redondo Beach. There he observed two vehicles parked in the driveway and he ascertained through official channels that one was registered to Mr. Carlson at that address and the other was registered to a car leasing company.

Officer Weller testified that during one of the police "night stakeouts" he observed Mrs. Carlson arrive at the home in an automobile. Thereafter she and Mr. Carlson walked to the rear of the vehicle, one of them opened the trunk, and Mr. Carlson removed a large box. A portion of his ensuing testimony was: "Q. Did you observe anything in that box that was removed from the trunk? A. From where I was standing they appeared to be envelopes, large envelopes, and appeared to be the same envelopes that we saw had been returned at the mail drop at 13609 Victory Boulevard."

Before continuing to relate testimony of the officer on direct examination, reference will be made to his testimony on cross-examination as to the box removed from the car, portions thereof being as follows: "Q. When you observed him on the first day, that was, I believe, the 15th of December at about 9:00 o'clock p.m.? A. Yes. Q. Was it dark? A. Yes. . . . Q. Were you able to read any of the printing on the envelopes on that occasion? A. No."

As to his observations of the actions of Mr. Carlson inside his house, Officer Weller testified on direct examination as follows: "Q. What did you see at that time after they took the envelopes? A. Mr. Carlson picked up the envelopes and took them inside the house. Mrs. Carlson followed him. We then proceeded away from the location, and I believe there is a street that runs -- I think it is south of the residence. I think it is Green Street. We walked up the sidewalk, and standing on the sidewalk we could look into the back yard of Mr. Carlson's residence. Q. Was there any fence around that back yard? A. Yes, there is a fence around the back yard. Q. And what kind of a fence was that? A. I believe it is wood. Q. But you were able to see into the back yard area? A. Yes, the sidewalk is higher -- it is a lot higher than -- it is not level with his property. Q. What did you see if anything at that time? A. We observed Mr. Carlson seated behind a desk. MR. WOLFE [defendant's attorney]: Objection, move to strike we observed. THE COURT: What did you observe. THE WITNESS: I observed Mr. Carlson seated behind a desk in what appeared to be a den. I saw him through a large sliding glass door. The lights were on. The curtains were pulled aside. BY MR. MACKSOUD [deputy district attorney]: Q. For all purposes, what did you see him doing? A. I saw Mr. Carlson sitting behind a desk with a stack of red boxes, small red boxes to one side, a large quantity of envelopes to the other, and some brown manila large envelopes. Observed Mr. Carlson opening letters, reading letters. I saw Mr. Carlson -- MR. WOLFE: Objection as a conclusion, reading. THE COURT: Overruled. THE WITNESS: I saw Mr. Carlson

picking up the large manila envelopes which were over to the right of Mr. Macksoud, remove a quantity of -- MR. WOLFE: Objection as being a conclusion that he picked up those envelopes. THE COURT: Overruled. THE WITNESS: He removed a large quantity of red boxes, placing the boxes in the envelopes, writing on the envelopes, placing stamps on the envelopes, and then stapling them shut. I also [saw] Mr. Carlson with what appeared to be order forms with pictures, ripping off the bottom portions, also placing order forms in envelopes. BY MR. MACKSOUD: Q. Were you able to see anything on those order forms? A. At that point, no. Q. And what else did you see after you saw him doing this? A. From time to time I would see Mr. Carlson get up and leave and come back with additional envelopes. He would walk out of my sight and come back. He would walk empty handed out and come back in with envelopes. Q. You viewed all of this from the sidewalk area? A. Yes. Q. What happened -- about how long did you view the activities? A. We watched Mr. Carlson for approximately 45 minutes from the sidewalk. We were using binoculars. Q. You were using binoculars? A. Yes. Q. You were yourself? A. Yes. Both of us switched back and forth. We then proceeded -- we left the location and we came back the next night. We then approached a house which is located south of Mr. Carlson's residence. If I could refer to the search warrant I could give you the address. MR. MACKSOUD: Your Honor, may the witness be [see] search warrant No. -- THE COURT: 7150. MR. MACKSOUD: 7150. Q. You need to refresh your recollection? A. Yes. I would like to make a correction on my

testimony. The steps leading up to the car, arriving at the driveway -- Mr. and Mrs. Carlson carrying the envelopes inside, that was on the 12th -- I mean 12-15-71. That terminated the investigation. We came back on 12-16 and then viewed Mr. Carlson packaging the red boxes. Q. And that was the night you observed it from the sidewalk area; is that correct? A. Yes. Q. Then you returned the next day then? A. No. Later on that evening after we watched Mr. Carlson packaging the red boxes, we proceeded to 2902 Green Street. I knocked on the door. I identified myself as a police officer and told them that I was conducting an investigation of Mr. and Mrs. Carlson, gave them their address and asked permission to enter the yard to watch Mr. Carlson's actions. Q. Did you get permission? MR. WOLFE: I would object to that as being hearsay, Your Honor. MR. MACKSOUD: For probable cause only. THE COURT: No, it isn't hearsay. Overruled. THE WITNESS: The party there stated that they would cooperate. They allowed me to go into there. THE COURT: That will be admitted as to probable cause. THE WITNESS: They allowed me to go in their back yard. BY MR. MACKSOUD: Q. For all purposes, when you got to the back yard, what did you do? A. My partner and I took up a position of advantage. We looked through a set of binoculars into the den, which we saw Mr. Carlson. Q. And what did you see? A. I saw Mr. Carlson packaging, taking the red boxes and placing them in the envelopes, the same thing I saw from the sidewalk, but a closer view. Q. Were you using binoculars again? A. Yes. I observed Mr. Carlson holding brochures with pictures on

them. Q. Were you able to see what kind of pictures they were? A. Yes, some of them. I could tell that some of them had sexual activity. Those brochures appeared to be the brochures that I had seen or had received in the mail from the irate citizen. Q. They appeared similar; is that correct? A. Yes. Q. You saw all this through binoculars? A. Yes. Q. Was the light on in the den there? A. Yes. Q. What did you see exactly and for what period of time? A. We watched Mr. Carlson for over an hour. Q. And he continued? A. Continued addressing envelopes, packaging the red boxes, opening envelopes, addressing order forms, ripping up -- ripping the bottom half of the forms. Q. How many order forms do you estimate that you saw at that time? A. A large quantity. I couldn't give you an estimate. It was a large amount. Q. Did they all appear similar to the one you had received in the mail? A. Some did. Some appeared to be similar to the one I had received, but they appeared to have more pictures on them. Q. But you were able to see that they were persons engaged in sexual activity? A. Yes. MR. WOLFE: Objection, Your Honor. Counsel is leading the witness. THE COURT: Overruled. BY MR. MACKSOUD: Q. For how long did you undertake that observation? A. It was over an hour."

On cross-examination Officer Weller testified: "Q. On the occasion that you made observations from the sidewalk, you could not see the contents of the material; is that correct? A. We could see that they were brochures with pictures, but I couldn't discern what type of activity. Q. The contents? A. Yes. Q. You then took up a

position of vantage. Were you in the house of the other individual or were you in their yard? A. In the yard. Q. Could you approximate the distance from where you were making these observations from the side yard or the yard of the neighbor's to where Mr. Carlson was seated in terms of feet or yards? A. This would be a rough estimate, but approximately 30 feet from where I was standing to where Mr. Carlson was seated. Q. Was it dark, nighttime? A. Yes. Q. You say you were using binoculars? A. Yes. Q. On this occasion it is your statement that you could see the contents of the brochures? A. Yes. Q. Could you read any of the printing on the brochures? A. No. Q. Could you discern the pictures? A. Some of the pictures, yes. Q. Approximately how many pictures did you see? A. A number of pictures. I don't recall the exact number but I could see different sides of the brochures. Q. Were these brochures being remove[d] from envelopes? A. Some of the brochures were being removed and some were being placed. I mean, -- well, some of the brochures were being placed into the manila envelopes too, the large manila envelopes. Q. Were the brochures in the envelopes similar to the one I am holding in my hand which is part of People's Twelve? A. No. Q. Were they in larger envelopes? A. They were in different size envelopes. Q. When I talk about envelopes, some were that size and some were the size of -- THE COURT: Well, by that size, he is indicating what apparently are return envelopes with John Harrison Company and address? MR. WOLFE: Yes, Your Honor. THE COURT: I think the box contains the filled out brochures and

personal envelopes that were mailed to the John Harrison, Jack Franklin Company would be a representation of what he was opening. BY MR. WOLFE: Q. Would it be fair to say that the brochures were in a folded condition when they came out of the envelopes? A. Yes. Q. Were they in a folded condition when they were placed in the envelopes? A. Yes. Q. Did you observe Mr. Carlson to open any of the brochures and examine them at full length? A. Yes. Q. Did he appear to be looking at pictures? A. At the pictures, yes. Q. What type of activity did you observe in the pictures, were you able to observe in the pictures? A. You mean what type of sexual activity? Q. Yes. A. Sexual intercourse, oral copulation, what appeared to be sexual intercourse and oral copulation. Q. From your position with your binoculars, you could actually see the details of the pictures as to the sexual organs and the placement of them? A. The exact details? Q. Yes. A. No. I said what appeared to be sexual intercourse and oral copulation. Q. Your position was such you couldn't see the details of what was going on? A. Not the exact details, no."

In Theodor v. Superior Court, 8 Cal.3d 77, at page 95, the Supreme Court stated that "in the absence of an express indication to the contrary in the statute, we cannot assume the Legislature when it enacted section 1538.5 [of the Penal Code] intended to abrogate the rule that defendants may attack the truthfulness of the affidavit" upon which the warrant is issued. With respect to the scope of the challenge to the accuracy of the affidavit it was noted that misinformation "may be in the form of inaccurate personal observations of law enforcement personnel."

In Theodor the Supreme Court further stated (8 Cal.3d at pp. 96-97):

"In assessing what standard should be employed in testing the truthfulness of an affidavit in support of a search warrant, we are guided by the general principle that probable cause, not certainty, is the cornerstone of the warrant-issuing process. [Citation.] 'Probable cause exists where "the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' a crime has been or is being committed.' [Citations.]

"The standard of probable cause is most often relevant in the determination of whether the inferences drawn by a magistrate or officer from the facts presented (see *Aguilar* v. *Texas, supra; Spinelli* v. *United States* (1969) 393 U.S. 410 [21 L.Ed.2d 637, 89 S.Ct. 584]) are reasonable. [Citation.] However, if a magistrate is presented with false or inaccurate information in an application for a warrant, the inferences he draws from such information are not based on reality but on the fantasies of the misinformed or misinforming affiant. Regardless of whether misstatements are intentionally false or the product of reasonable or unreasonable cerebration, their ineluctable result is an adverse effect upon the normal inference-drawing process of the magistrate. Because of the significance rightfully attached to the neutral magistrate, at least one commentator suggests [citations] that if inaccuracies are demonstrated they must be excised from the affidavit regardless of whether the errors were reasonable under the circumstances. Under this approach the court is to determine whether probable cause existed for the search only on the basis of the expurgated truthful information. [Fn. omitted.]

"We reject this approach as being inconsistent with the overriding principle of reasonableness which governs the application of the Fourth Amendment to the criminal law. Instead, we conclude that only when the affiant has acted unreasonably in making factual mistakes must those errors be excised from the affidavit before testing the existence of probable cause. While undeniably misstatements impede the function of the magistrate, once it has been determined that the affiant has acted reasonably under the circumstances, little more can be required of him. To exclude evidence obtained pursuant to a warrant issued on the basis of facts upon which an affiant has reasonably relied as being accurate serves no purpose of deterrence to unlawful conduct since, by definition, the affiant has already made a reasonable attempt to comply with the requirements of the Fourth Amendment."

In summary the Supreme Court stated in Theodor (8 Cal.3d at pp. 100-101): "Accordingly, we hold that pursuant to a motion under Penal Code section 1538.5, a defendant may challenge the factual veracity of an affidavit in support of a warrant and if statements contained therein are demonstrated to be false and if the affiant was unreasonable in believing the truth of such information, those facts must be excised from the affidavit and probable cause tested from the remaining truthful information."

In his affidavit in support of the search warrant relating to the Redondo Beach address, Officer Jamieson set forth facts which warranted the police in going to the location of the defendant's home in Redondo Beach for the purpose of making an investigation.[5] While Officer Jamieson was in a place where he had a right to be, he observed the defendant's activities. Under the circumstances set forth in the affidavit it was reasonable for the officer to form the belief that material which he saw the defendant handle was "like" the order form and pictures which were attached to the affidavit. That his position was such as to preclude a minute examination of the observed material did not constitute a bar to the existence of probable cause to believe that that material was obscene because the concept of probable cause, as has been noted, does not embody the element of certainty.

The testimony of Officer Weller which was before the court at the hearing of the motion to suppress evidence, and to which reference has been made hereinabove, supported the inference that

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5 This is true even if the statements relating to the seizure of the film at the post office be excised from the affidavit.

the material being handled by the defendant could be reasonably identified as being of an obscene nature by use of binoculars from the officers' location some thirty feet away from the defendant's position. The observation was shown to have been made by the officers from a place on the adjoining property which they had been given permission to enter. Instead of showing the absence of a factual basis for the existence of probable cause, the testimony of Officer Weller at the hearing of the motion to suppress fortified the conclusion of the existence thereof.

With respect to other challenges to the search warrant, only brief discussion is required. It was not necessary, before issuing the search warrant, that the magistrate personally view any of the materials which the officers had seen in the Redondo Beach premises. (See Monica Theater v. Municipal Court, 9 Cal.App.3d 1, 13.) Moreover, with respect to another portion of the defendant's position on this appeal, apt reasoning is found in People v. Sarnblad, 26 Cal.App.3d 801, at pages 806-807:

> "Nor in light of the factual assertions contained in the affidavit can we conclude it was necessary for affiant to therein assert an expertise in the area of contemporary community standards or for the issuing magistrate to be apprised therein of such standards in order for him to determine the issue of probable cause. The only reason for such a showing would be to provide a means of establishing the obscene nature and identity of the matter to be seized under the warrant; but for the purpose of probable cause here the factual allegations themselves are sufficient to establish the obscenity factor and identity of the films."

(See People v. Luros, 4 Cal.3d 84, 87-89.)

Since there was the requisite showing of probable cause for believing that the defendant was in possession of obscene material at his residence, the search warrant was properly issued.

The defendant states in the "CONCLUSION" of his brief: "The convictions should further be reversed on the basis that allowing an amendment to charge misdemeanors on the day of trial is an unfair disadvantage to the defendant, when the defendants are prepared to defend only one felony conspiracy and at the last minute are required to defend all six new misdemeanor charges not involving conspiratorial conduct, . . ." As will be explained, in the light of the record and the applicable law, that contention is untenable.

The pertinent portions of the record on the day on which the matter came on for trial are as follows: "THE COURT: People ready to proceed? MR. DAVIS [deputy district attorney]: Yes, Your Honor. People would ask leave of the court to file an amendment to the information. Notice was given to all defense counsel on this matter that we would make such a motion. MR. WOLFE [defendant's attorney]: I received a telephonic message last week that there would be such a motion, and I would strenuously object to any filing of amendments at this late date. Defendants were arrested over seven months ago on this matter. The People now, the day of trial, decide to come in on a motion to amend. THE COURT: Well, it doesn't sound like they decided on the day of trial. I agree with you, they indicated on the hearing on the 995 they thought the case was over filed, and there should be a proper filing, and if they

did call you last week, probably it was to save an extra appearance in court. MR. WOLFE: Yes, they did call last week. . . . THE COURT: All right, the motion to file amendment to the information is granted. MR. DAVIS: May the record reflect that I am handing a copy of the amendment to the information to counsel for each of the defendants. I'm filing the original with the clerk of the court. . . . MR. WOLFE: I would object to a continuance at this time. This case is set. It was set on a date that I objected to, to begin with. THE COURT: I'm going to grant Huffine a continuance, and if you don't want a continuance, we will try the case as far as you are concerned. . . . MR. DAVIS: May I arraign the defendants on the amendment to the information? MR. WOLFE: We could sever. THE COURT: Yes, you could sever. Yes, sir."

The governing law is set forth in People v. Valles, 197 Cal.App.2d 362, at page 371, as follows:

> "The final problem on this appeal relates to the amendment of Count III of the information to conform to proof by adding three other narcotics in addition to the one already charged, over the objection of defense counsel, after all the evidence had been presented and both sides had rested.
>
> "Under section 1009, Penal Code, and the case law, the trial court may permit an amendment to an information at any stage of the proceedings provided: (1) the amendment does not prejudice the substantial rights of the defendant [citations] ; and (2) it does not 'charge an offense not shown by the evidence taken at the preliminary examination.' [Citation.]"

In this case in which, as to each count, the issue of guilt was submitted upon the transcript of the preliminary hearing, there is no basis for a claim of error because of the

amendment of the information. Moreover, as has been noted, counsel for the defendant Gary Gilbert Carlson did not request a continuance of the date of trial but, rather, insisted on proceeding to trial.

The final contention to be considered is that the trial court violated the proscription against multiple punishment embodied in section 654 of the Penal Code in that sentence was imposed as to both counts II and VII, involving offenses alleged to have been committed on or about December 17, 1971. By way of counter argument the People state: "Respondent disputes that the same facts sufficed for convictions under both counts. More than one type of obscene matter was involved. The facts showed both obscene films (Exh. 7) and obscene advertisements (Exh. 12) along with filled out order forms (Exh. 17) for the films. [Reference to clerk's transcript.] The obscene films (Exh. 7) were the express subject matter of Count VII alleging a violation under Penal Code section 311.2 [reference to clerk's transcript]. The obscene advertisements and order forms pertain to the violation of Penal Code section 311.5 alleging the unlawful promotion of the sale and distribution of matter represented and held out by appellant as obscene under Count II of the information."

The allegations of counts II and VII are noted hereinabove in footnote 1 of this opinion. Under section 311.9 of the Penal Code the punishment prescribed for violation of section 311.2 is the same as that prescribed for violation of section 311.5.

With respect to the principles governing the application of section 654 of the Penal Code, it was stated in People v. McFarland, 58 Cal.2d 748, at page 760: " . . . the prohibition of the statute against double punishment applies not only where 'one "act" in the ordinary sense' is involved but also where there is a 'course of conduct' which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of section 654; that the divisibility of a course of conduct depends upon the intent and objective of the defendant; and that if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one."

In the present case it is manifest that the intent and objective of the defendant Gary Gilbert Carlson was to distribute obscene film for profit and that the offense of promoting the sale and distribution of matter represented to be obscene and the offense of possessing and preparing obscene matter with intent to distribute it to others were incident to that one objective. The course of conduct of the defendant comprised an indivisible transaction which came within the statutory proscription of multiple punishment. Consequently, the defendant could be punished for violation of either section 311.2 or section 311.5, but not for violation of both.

The judgment is reversed insofar as it imposes a sentence for violation of section 311.5 of the Penal Code, and in all other respects it is affirmed.

FORD, P.J.

We concur:

SCHWEITZER, J.

ALLPORT, J.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 18 1973

I have this day filed Order

HEARING DENIED

In re: 2 Crim. *No.* 22937

People

vs.

Carlson

Respectfully,

G. E. BISHEL
Clerk

11921-977 9-73 3M OSP

IN THE

Supreme Court of the United States

FEB 27 1974

MICHAEL RODAK, JR., CLERK

October Term, 1973
No. 73-988

GARY GILBERT CARLSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinion Below

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, was certified for nonpublication. A copy of this opinion is attached as Appendix A to the petition for writ of certiorari herein.

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to United States Code, Title 28, Section 2101.

Questions Presented

1. Must the affiant for a search warrant as to allegedly obscene materials be a qualified expert as to legal obscenity and satisfy by factual averments the elements of legal obscenity before the warrant can issue?

2. Did the police violate petitioner's reasonable expectation of privacy in gathering information used in the affidavit for the search warrant?

3. Did amendment of the information on the day of trial to charge misdemeanors place petitioner at an unfair advantage?

Statement of the Case

In an amended information filed by the Los Angeles County District Attorney, petitioner was charged with the following crimes: conspiracy to violate California Penal Code sections 311.2 and 311.5 (Count I); violation of California Penal Code section 311.5 in that he promoted the sale and distribution of matter represented as obscene (Counts II and VI); violation of California Penal Code section 311.2 in that he prepared and offered to distribute obscene films (Counts V and VII). [Cl. Tr. pp. 121-30; Rep. Tr. pp. 4-6.][1] Petitioner pleaded not guilty. [Cl. Tr. p. 131.] His motions under California Penal Code Sections 995 and 1538.5 were denied. [Cl. Tr. pp. 134-35.]

By stipulation petitioner submitted his cause on the testimony contained in the transcript of the preliminary hearing. [Cl. Tr. p. 135; Rep. Tr. pp. 17-18.] Petitioner was found not guilty as to Counts I, V, and VI, but guilty as charged in Counts II and VII. [Rep. Tr. p. 135.]

Petitioner was sentenced to 180 days in the county jail as to each count with the sentences ordered to run consecutively. He appealed the judgment. [Cl. Tr.

[1]It is respondent's understanding that petitioner has submitted copies of the Clerk's and Reporter's Transcripts with his petition. Hence, in the interest of brevity, respondent does not deem it necessary to attach copies of said transcripts to this response.

pp. 136-37; Rep. Tr. pp. 26, 29-30] His conviction was affirmed on August 21, 1973, with the sentence as to Count I (Pen. Code § 311.5) reversed insofar as it imposed punishment therefor. (Appendix A, Petn.)

Statement of Facts[2]

On December 1, 1971, Los Angeles City Police Officer David Weller received a letter from an unknown citizen "complaining about some obscene material that was unsolicited that she had received." The letter contained an "order form" [Exh. 5] with the address of John Harrison, 13609 Victory Blvd., Van Nuys. Weller proceeded to that address and saw that it was a business office complex and that Harrison occupied Suite 135. Weller served search warrant No. 7134 [Exh. 1] on the Van Nuys address on December 2, 1971. Inside Suite 135 Weller found 5 to 8,000 letters stacked up which had been "returned" and stamped with words to the effect of "return to sender." The return address was that of John Harrison at 13609 Victory Boulevard. [Cl. Tr. pp. 31-35.]

Around December 15 Weller and Officer Jamieson staked out the location at 2002 Perry Street, Redondo Beach. During one of the night stakeouts petitioner's wife parked and entered the house. In about two minutes she and petitioner came from the residence, opened the trunk of the vehicle and petitioner removed a large box of envelopes which appeared to be the same as the envelopes which Weller saw returned at the mail

[2]It was stipulated that the evidence heard at the hearing pursuant to Penal Code section 1538.5 was to be used for purposes of the preliminary hearing. [Cl. Tr. pp. 29-30, 110.] This evidence in turn was used for the guilt phase of the trial. [Rep. Tr. p. 18.]

drop at 13609 Victory Boulevard. Petitioner and his wife entered the residence. [Cl. Tr. pp. 39-40, 43.]

On December 16, Weller and Jamieson positioned themselves so they could look into the back yard of petitioner's residence. Through a large sliding glass door Weller saw petitioner seated behind a desk in the den with a stack of small red boxes on one side, and a large quantity of brown manila envelopes on the other. He saw petitioner open and read letters, pick up the manila envelopes, place red boxes in the envelopes, write and place stamps on the envelopes, and staple them shut. He also observed petitioner rip off the bottom portions of what appeared to be order forms with pictures and place order forms in envelopes. From time to time petitioner would leave Weller's view and return with more envelopes. The officers watched petitioners with binoculars from the sidewalk area for about 45 minutes. [Cl. Tr. pp. 40-43.]

Obtaining a closer vantage point, Weller again saw petitioner packaging the red boxes in the envelopes. Weller had a "closer view" and he saw petitioner holding brochures with pictures of sexual activity similar to the brochures which Weller had received in the mail from the "irate citizen." Weller watched petitioner for over an hour. The latter continued addressing envelopes, packaging the red boxes, opening envelopes, addressing order forms, and ripping the bottom half of the forms. Weller saw a large quantity of order forms, some of which appeared similar to the one he had received in the mail with pictures of persons engaged in sexual activity. [Cl. Tr. pp. 43-45.] Some of the brochures were placed into the manila envelopes. [Cl. Tr. p. 75.] Weller saw petitioner open the brochures and

examine them at full length. While Weller could not see the "exact details," he did observe pictures on the brochures of apparent sexual intercourse and oral copulation. [Cl. Tr. pp. 76-77.]

Weller obtained a search warrant for petitioner's residence which he and other officers served on petitioner on December 17. In the den Weller saw 30 to 40 large, brown, stamped envelopes which were addressed, a large quantity of red boxes, loose reels of 8 millimeter film, and brochures depicting "numerous acts of sexual intercourse, sodomy, oral copulation." Weller seized about 626 reels of black and white and color 8 millimeter film [Exh. 7], some in red boxes and some in envelopes, depicting sexual acts, still photos of the same photos on the brochure, and, from petitioner's desk, a number of photos set on cardboard backing [Exh. 6] which appeared to be proofs for the brochures. He also seized mailing lists, "personal business records showing paid out for processing film, brochures; return envelopes with the John Harrison Company;" brochures with similar pictures from the brochure Weller had received in the mail; numerous still photos of sexual acts; cancelled envelopes and orders, and the items listed on the return to the search warrant. [Cl. Tr. pp. 46-50.] Also found in petitioner's desk was an invoice [Exh. 8] for envelopes showing delivery to 4209 Lankershim Boulevard, North Hollywood, with a "printed return" for John Harrison. [Cl. Tr. pp. 51-53, 57.] Also found in the den was a box containing a large quantity of filled out order forms [Exh. 17] for films. [Cl. Tr. pp. 69-72.]

Weller went to 4209 Lankershim Boulevard, North Hollywood, on December 23, where he contacted the owner of the building, Richard Huffine. [Cl. Tr. pp.

55-57.] At the Lankershim address Weller saw a large quantity of boxes and envelopes with the "reading John Harrison Company at 13609 Victory Boulevard," and a large quantity of brochures with sexual acts similar to those he had seen at petitioner's residence on 2002 Perry Street. Weller obtained a search warrant for the Lankershim address and seized the following items there: 5 boxes of envelopes labeled "sexually oriented addressed to adults only" [Exh. 10]; 10 boxes of envelopes labeled "John Harrison, 13609 Victory Blvd., Van Nuys, California" [Exh. 11]; a tray of differently addressed envelopes [Exh. 12] with a "return address of John Harrison." One of the envelopes was addressed to an individual in Florida. Weller also saw a machine at the address "processing" envelopes marked "sexually oriented ad." [Cl. Tr. pp. 62-67.]

It was stipulated that the films [Exh. 7], the advertisements [Exh. 12] and the filled out order forms for films [Exh. 17] were obscene within the meaning and effect of California Penal Code section 311.2. [Cl. Tr. pp. 102-03.]

ARGUMENT

I

Probable Cause for Issuance of a Search Warrant to Seize Obscene Matter Does Not Demand That the Affiant Be an Expert in Legal Obscenity or That the Magistrate Actually View the Matter Sought to Be Seized

Petitioner, in attacking the search warrant for his residence, asserts that Officer Weller's affidavit therefor had to qualify him as an expert in obscenity and show how each of the elements for obscenity were met by the material to be seized. He also contends that the magistrate had to personally observe the material sought for seizure and that he could not rely upon Weller's averment that the material he viewed in petitioner's residence was "similar" to the matter which Weller had received in the mail from the concerned citizen. (Petn. pp. 6-7.)

That the affiant for a search warrant for the seizure of obscene matter need not be an expert in legal obscenity[3] and show in his affidavit facts satisfying all the

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[3]Legal obscenity is defined in California Penal Code section 311 as follows:

> "(a) 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." *See People v. Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433.

However, such is no longer the federal standard for obscenity inasmuch as *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) is no longer the rule. *Miller v. California*, 413 U.S. 15 (1973).

legal elements of obscenity flows logically as a proposition from *People v. Luros*, 4 Cal. 3d 84; 92 Cal. Rptr. 833; 480 P.2d 633. In *Luros* it was argued that a grand jury indictment for conspiracy to violate California Penal Code section 311.2 was void inasmuch as the grand jury received no evidence on contemporary community standards on the issue of probable cause. The California Supreme Court, pages 87-90, rejected the argument and held that the indictment proceedings were only for determining if there was probable cause to believe the matter obscene, not for determining that in fact it was obscene. *See also,*

Aday v. Superior Court, 55 Cal. 2d 789, 798; 13 Cal. Rptr. 415; 362 P. 2d 47;

People v. Aday, 226 Cal. App. 2d 520, 531; 38 Cal. Rptr. 199;

People v. Golden, 20 Cal. App. 3d 211, 216; 97 Cal. Rptr. 476;

People v. Sarnblad, 26 Cal. App. 3d 801, 806-08; 103 Cal. Rptr. 211.

Further as stated in *Theodore v. Superior Court*, 8 Cal. 3d 77, 96-97; 104 Cal. Rptr. 226; 501 P. 2d 234:

> ". . . probable cause, not certainty, is the cornerstone of the warrant-issuing process.
>
> ". . .
>
> ". . . only when the affiant has acted unreasonably in making factual mistakes must those errors be excised from the affidavit before testing the existence of probable cause. . . ."

In the instant case, as stated by the California Court of Appeal (Petn., Appendix A, pp. 20-21), it was not unreasonable for the officer to conclude that the mate-

rials he saw petitioner handling were similar to the material received in the mail from the concerned citizen, which latter material was attached to the affidavit for the magistrate to view.

It appears there is no need for the magistrate to view the material to be seized prior to issuing the search warrant. This is so even in cases where the matter is a film in a public theater or a book in a public bookstore where samples of the allegedly obscene matter can easily be obtained and viewed prior to issuance of the warrant. *See Monica Theater v. Municipal Court*, 9 Cal. App. 3d 1, 13; 88 Cal. Rptr. 71; *People v. Renzy*, 275 Cal. App. 2d 380, 387-88; 79 Cal. Rptr. 777. Indeed, in the case at bar, where the material to be seized was not accessible to the public, but rather, was in petitioner's residence awaiting distribution, it would have been impossible for the magistrate to obtain the material for viewing without having first seized it.

Probable cause for the issuance of the warrant exists if a man of ordinary care and prudence would be led to conscientiously entertain an honest and strong suspicion that the accused is guilty, or that contraband was present. *People v. Golden, supra*, 20 Cal. App. 3d 211, 217. Respondent submits that the warrant properly issued. Officer Weller attached to the warrant the obscene matter which he had received from the complaining citizen. He averred to the magistrate that the brochures he saw petitioner handling were similar to the one he had received. [Cl. Tr. pp. 10-17, 44-45, 76-77.] Respondent submits that it was sufficient for the magistrate to view similar material, rather than the actual material sought to be seized, for purposes of issuing a search warrant.

II

The Officers Observed Petitioner From a Legally Acceptable Vantage Point, and He Should Not Be Allowed to Attack Seizure of the Evidence on This Ground for the First Time on Appeal

Petitioner challenges the activity of the police in viewing him in his residence through open curtains at night with binoculars over a fence from his neighbor's property. Although the neighbor gave the police permission to enter his property, petitioner nevertheless asserts, under *Katz v. United States,* 389 U.S. 347 (1967), that his reasonable expectation of privacy was violated by the police activity. He asserts the California Court of Appeal "blithely ignored" *Katz* in affirming his conviction. (Petn. pp. 7-8.)

Petitioner, however, did not raise this particular issue at the trial level. His argument at the motion to suppress was an attack against the averment in the affidavit for the search warrant that the materials petitioner handled were similar to those attached to the affidavit which were received in the mail. [Cl. Tr. pp. 105-09.] In fact, that attack was petitioner's "entire point." [Cl. Tr. p. 109, lines 2-7.] Nor did petitioner raise the issue in his brief on appeal. (*See* copy of argument portion of petitioner's brief in the California Court of Appeal attached hereto as an Appendix.)[4] Respondent sub-

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[4]Oral argument in the Court of Appeal occurred on August 15, 1973, at which time petitioner's counsel cited *Lorenzana v. Superior Court,* 9 Cal. 3d 626, 108 Cal. Rptr. 585, 511 P. 2d 33, decided June 20, 1973, subsequent to the filing of his brief, wherein evidence was held illegally obtained because the officers were trespassing on the defendant's property. However, the Court of Appeal noted that in petitioner's case, there was no such trespass. (Petn., Appendix A, pp. 9, 15, 20-21.) Moreover, it is obvious from the petition that petitioner is relying on *Katz,* decided in 1967, well before the filing of the case against petitioner on June 30, 1972. [Cl. Tr. p. 124], rather than on *Lorenzana.*

mits, in accordance with reasonable state procedure, that this failure of petitioner to raise the precise issue at trial level precludes its consideration on appeal. *People v. Sirhan,* 7 Cal. 3d 710, 740; 102 Cal. Rptr. 385; 497 P. 2d 1121; *People v. Moore,* 13 Cal. App. 3d 424, 433, 91 Cal. Rptr. 538; *People v. Carter,* 192 Cal. App. 2d 648, 661, 13 Cal. Rptr. 541.

Katz, supra, upon which petitioner relies, is completely different factually. Unlike petitioner's situation, it involved electronic eavesdropping by the police to a conversation which both parties thereto believed private. No such activity was involved in the instant case. The activity of the police in gaining the vantage point upon petitioner's neighbor's yard should not be condemned. Petitioner concedes there was no trespass there. (Petn. p. 8.) Inasmuch as the police were where they had a right to be, respondent submits that petitioner's contention should be disallowed. *Lorenzana v. Superior Court, supra.*

III

Amendment of the Information Was Proper and Caused Petitioner No Prejudice

Petitioner, in the "conclusion" of his petition, claims that allowance of the "amendment to charge misdemeanors on the day of trial" caused him to suffer an "unfair disadvantage." (Petn. p. 9.) The point is without merit.

The trial court may permit an amendment to an information at any stage of the proceedings provided the amendment does not prejudice the substantial rights of the defendant and it does not charge an offense not shown by the evidence taken at the preliminary examination. Cal. Pen. Code § 1009; *People v. Valles,* 197

Cal. App. 2d 362, 371; 7 Cal. Rptr. 362. Here, there is no claim that the amendment charged crimes other than that shown by the evidence taken at the preliminary hearing. Indeed, petitioner's cause was submitted upon that evidence. [Rep. Tr. p. 18.]

It also should be noted that at trial petitioner did not claim surprise or request a continuance so that he could prepare his defense. Petitioner's counsel refused the court's offer of a continuance. [Rep. Tr. p. 5, lines 11-17.] Counsel was obviously ready for trial. Thus, it cannot be said that the amendment caused petitioner any prejudice.

Conclusion

For the foregoing reasons, respondent requests denial of the petition for writ of certiorari.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

JACK R. WINKLER,
Chief Assistant Attorney General—Criminal Division,

S. CLARK MOORE,
Assistant Attorney General,

NORMAN H. SOKOLOW,
Deputy Attorney General,

By BRADLEY A. STOUTT,
Deputy Attorney General,

Attorneys for Respondent.

APPENDIX

ARGUMENT I.

The materials in question which were a large quantity of reels of film, approximately 628 reels of film, and a quantity of advertising materials in relation to said films, were seized pursuant to the search warrant of the Redondo Beach Police Department. The search warrant was based on an anonymous complaint by an informant which led the officers to a Van Nuys address, where the officers observed certain envelopes with the return address of The John Harrison Company. Subsequent thereto, the officer had a discussion with a postal inspector around the 10th of December, 1971, who advised that the defendant and appellant owned and controlled The John Harrison Company and provided a Redondo Beach address to the officer. Clerk's Transcript Pg. 38, lines 15-28. Clerk's Transcript Pg. 39, lines 1-4. The officer then proceeded to the Redondo Beach address pursuant to same, and on two separate nights, made the observations referred to and at his home address saw material that looked similar only and materials that he could not discern the exact details. In order for a Magistrate or a Judge to issue a search warrant in reference to materials covered by the First Amendment of the U.S. Constitution, the Magistrate or Judge must be convinced that the three pronged tests of the *Roth* case have been met. *Roth vs. United States,* 354 U.S. 476. However, in the residence here, the officers showed certain material received from the anonymous informant to the Magistrate, but it was not these materials that supported the warrants, but the officer's statements that he observed similar materials. The officer was not qualified as an expert nor did he

say the materials were exactly the same, nor did the officers testify that the materials he observe through the window of the Redondo Beach property appealed primarily to the prurient interest of the average adult, that the materials transcended community standards in depicting sex and nudity and that the materials taken as a whole were utterly without redeeming social value. Instead, he merely stated that the materials appeared to be similar and that he could not see the exact details nor could he read any of the printed materials and yet based upon those statements, the Magistrate or Judge who issued the search warrant determined that the officer's observations were obscene material, despite the fact that the Court did not personally observe any of the materials that the officer observed in the Redondo Beach premises.

ARGUMENT II

The defendant was found not guilty of all counts except counts 2 and 7. Count 2 being a 311.5 Penal Code violation and Count 7 being a 311.2 Penal Code violation, both misdemeanors. An examination of the Amended Information shows that Count 2 as alleged in the 311.5 violation, was alleged to have been committed on December 17, 1971, and Count 7, the 311.2 violation, was also alleged to have been committed on or about December 17, 1971. A reading of the transcript will show that there is only one incident involved on the 17th of December, 1971, and that both counts involve the same facts, but are merely different ways of charging the same facts as a crime, one being to unlawfully promote the sale and distribution of matter represented to be obscene and the other being one involving the preparation, etc. of obscene materials or having same in their possession with intent to distrib-

ute obscene material. A reading of the factual materials in the transcript will show that the only proof in reference to the defendant was that he was apparently preparing for distribution, the films in question on the 17th day of December, 1971 so that both counts relate to the same fact and therefore, the defendant by receiving a consecutive sentence on the 2 counts is being doubly punished, despite the prohibitions of Section 654 of the Penal Code.

CONCLUSION

The convictions herein should be reversed for the reasons that the search warrant was not based upon the Magistrate viewing of the materials personally, but merely upon the officer relating to the Magistrate that the materials that the officer observed were similar to the ones shown to the Magistrate. The convictions should further be reversed on the basis that allowing an amendment to charge misdemeanors on the day of trial is an unfair disadvantage to the defendant, when the defendants are prepared to defend only one felony conspiracy and at the last minute are required to defend all six new misdemeanor charges not involving conspiratorial conduct, and in addition, at least one of the sentences should be reversed on the basis that the defendant received double punishment for the same conduct in that consecutive sentences of 180 days each for the 2 counts involving the same facts occurring on the same day, which were merely charged in different counts is prohibited by Section 654 of the Penal Code.

Respectfully submitted,

/s/ BRUCE P. WOLFE
BRUCE P. WOLFE
Attorney for Defendant

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SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-988

GARY GILBERT CARLSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO FILE
PETITION FOR REHEARING
AND
PETITION FOR REHEARING

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Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-938

GARY GILBERT CARLSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO FILE
PETITION FOR REHEARING
AND
PETITION FOR REHEARING

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IN THE SUPREME COURT

OF THE UNITED STATES

GARY GILBERT CARLSON,

Petitioner,

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THE PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO FILE
PETITION FOR REHEARING
AFTER THE TIME FOR
FILING SAME HAS EXPIRED

COMES NOW THE PETITIONER, GARY GILBERT CARLSON AND PETITIONS THE HONORABLE JUSTICES OF THIS COURT FOR LEAVE TO FILE a Petition for Rehearing beyond the time allowed by Rules of Court.

The last day to file the Petition for Rehearing in this matter was April 12, 1974. On April 8, 1974, petitioner's attorney delivered to the printer in Los Angeles, the

draft of the Petition for Rehearing which was duly printed and mailed by said printer to Washington on April 10, 1974. Through inadvertence of the printer, the same was mailed to the Solicitor General of the U. S. and was received in the Washington Post Office on April 12, 1974, which was the last day to file said Petition. The Petition for Rehearing was not delivered by the Post Office Department to the Solicitor General until April 15, 1974, there being an intervening weekend between the April 12, 1974 receipt by the Post Office in Washington and the Monday date of April 15, 1974. The Solicitor General immediately sent the documents by messenger to the Supreme Court where it was received on April 15, 1974, which information was supplied to this petitioner in the form of a letter from William V. Gullickson, Assistant Clerk of the U. S. Supreme Court.

WHEREFORE, petitioner prays for leave to file his Petition for Rehearing, which is enclosed herewith.

Respectfully submitted,

BRUCE P. WOLFE

IN THE SUPREME COURT

OF THE UNITED STATES

GARY GILBERT CARLSON,

Petitioner,

vs. No. 73-988

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING

COMES NOW THE PETITIONER, in the above entitled matter and petitions this Honorable Court for a rehearing from an Order denying a Writ of Certiorari to the Court of Appeals, Second Appellate District, State of California.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to the United States Court

Rule 58.

QUESTION PRESENTED

In the Response in Opposition to Petition for Writ of Certiorari filed by the Attorney General of the State of California, it is asserted that the challenge to the search warrant raised before this Honorable Court, was not properly raised in that in the courts below petitioner attacked the search warrant on other grounds. This is a novel point and one totally unsupported by law. Petitioner in fact challenged the search raising the Fourth Amendment and the applicable State Constitutional provisions and the fact that petitioner did not specifically mention the Katz case below is of little import, since the question of search is the key question and it has been raised in every stage of the proceedings. All search and seizure questions are founded in the Fourth Amendment and the particular case theory interpreting that Section need not be raised at every stage of the proceedings so long as the basic Fourth Amendment search question is raised. To allow this type of clandestine surveillance into a man's home at night through an apperture in curtains with binoculars is a disgusting over-extension of Governmental intrusion into the privacy of the citizens of this Country.

CONCLUSION

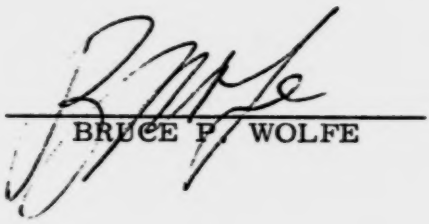
Petitioner requests that this Honorable Court grant a rehearing and grant the Petition for Writ of Certiorari.

Respectfully submitted,

BRUCE P. WOLFE

Attorney for Petitioner

I certify that this Petition is not filed for the purposes of delay and is filed in good faith.



BRUCE P. WOLFE